Petition

81-833

Office - Supreme Court, U.S.
FILED
OCT 20 1981
ALEXANDER L. STEVAS
CLERK

IN THE SUPREME COURT OF THE

UNITED STATES OF AMERICA

TERM: OCTOBER, 1981

JOHN M. ROSS,

PLAINTIFF-APPELLANT,

vs.

THE HONORABLE ROSE BIRD, in her capacity as Chief Justice of the California Supreme Court

and

SAN DIEGO COUNTY SUPERIOR COURT JUDGES ALFRED LORD, ROSS G. THARP, PAUL EUGENE OVERTON, FRANKLIN B. ORFIELD, RAUL ROSADO, and EDWARD BUTLER,

and

THOMAS W. FOWLER, DONNA M. FOWLER, D.W. MITCHELL aka DALE W. MITCHELL, JANET P. HALL, MARTIN A. KENNEDY, SHARON L. KENNEDY, FOWLER & MITCHELL DEVELOPMENT, RICHARD CRAKE, PHILIP COHEN and MARK HOMME,

DEFENDANTS-APPELLEES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
CASE NOS. 79-3509 AND 80-5223

PETITION FOR WRIT OF CERTIORARI

John M. Ross
Attorney For Petitioner
(Admitted April 1, 1974)
225 Broadway, Suite 900
San Diego, CA. 92101
Phone (714) 231-9991

I

QUESTIONS PRESENTED FOR REVIEW

ISSUE I: Is an action whereby a home buyer attempts, via a diversity action, to secure conveyance of title to real estate, in the form of a grant deed, in an action for specific performance and/or to quiet title, an action in rem or quasi in rem?

ISSUE II: When does a U.S. District Court acquire jurisdiction over parties and property involved in a diversity action?

ISSUE III: Does a U.S. District Court acquire exclusive jurisdiction of an action in rem or quasi in rem so as to divest any State court from assuming any jurisdiction over the parties or property involved in the federal action?

ISSUE IV: May a federal court issue an injunction to stay a second action filed in a State court concerning the persons and

property involved in a prior diversity action, pursuant to the in rem exception of 28 U.S.C. §2283?

ISSUE V: Are the parties, their attorneys, and State court judges, who continue the maintenance of a second lawsuit concerning the same parties and real estate as are the subject of a prior diversity lawsuit, by engaging in tactics which include denial of an evidentiary hearing and incarceration when their is a lack of jurisdiction, subject to a civil rights action pursuant to 42 U.S.C. §1983, et. seq.?

ISSUE VI: Are the State court judges in this case immune from liability, or are they liable because they are acting where they have a total lack of jurisdiction?

ISSUE VII: Does the continuing refusal of California courts to apply the California first tribunal rule as to a diversity

litigant who is a citizen of a different State, constitute a violation of the equal protection clause of the 14th Amendment?

Note: The California State first tribunal rule provides that the first tribunal to acquire jurisdiction in a case has exclusive jurisdiction, and there are no exceptions.

ISSUE VIII: Is waiver or abstention involved in this case?

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II

OPINION & JUDGMENT APPEALED

This petition for certiorari is from the Order denying rehearing issued by the United States Court Of Appeals For The Ninth Circuit, sitting at Los Angeles on July 22, 1981 in Case No. 79-3509 and Case No. 80-5223.

The Memorandum opinion of the Court of Appeals was filed on May 18, 1981. It adopted the Order filed in the U.S. District Court at San Diego on July 30, 1979.

III

JURISDICTION

Jurisdiction of the Court is acquired by 29 USC §2101 (c) and Rules 17, 20.2 and 20.4 of the Rules of the United States Supreme Court. The time for filing of this petition for certiorari is ninty days from July 22, 1981, or by October 20, 1981.

This petition for certiorari involves two cases with identical or closely related

issues; and the two cases are presented in one petition pursuant to Rule 19.4 of the Rules of the United States Supreme Court.

IV

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THIS CASE

A. Fifth Amendment, U.S. Constitution:

> No person shall ... be deprived of life, liberty, or property, without due process of law.

B. Fourteenth Amendment, U.S. Constitution:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the priviledges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

C. 28 U.S.C. §2283. Stay of State Court Proceedings:

> A court of the United States may not grant an injunction to stay proceedings in a State Court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

D. 42 U.S.C. §1983:

> Every person who, under color of any statute, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

E. Calif. Code of Civil Procedure §430.10:

> The party against whom a complaint or cross-complaint has been filed may object or answer as provided in Section 430.30, to the pleading on any one or more of the following grounds:
>
> (a) The court has no jurisdiction of the subject of the cause of action alleged in the pleading. ...
>
> (c) There is another action pending between the same parties on the same cause of action. ...

F. Calif. Code of Civil Procedure §430.30(c):

> . . .
>
> (c) A party objecting to a complaint or cross-complaint may demur and answer at the same time.

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V

STATEMENT OF THE CASE

A. Introduction

Some of the facts presented below may initially seem irrelevant to the central issues in this appeal; however, they relate to the purposes for diversity jurisdiction.

This case seems to have evolved into a political-legal dispute pitting passionate forces. The debate has degenerated to the point that the building contractor and the attorney for the building contractor in this case have sought to have the appellant prosecuted. That prosecution resulted in a directed verdict of acquittal.

Also, the District Court has actively participated in efforts to have the appellant indicted for collateral matters and to force the appellant to testify before the Grand Jury. The latter effort may have been intended to seek an error in testimony and a perjury indictment.

Finally, the District Court blatantly improperly transferred a collateral case to its docket for the purpose of attempting to issue a finding of contempt against the appellant. After these circumstances were brought to the attention of the chief judge, the matter involved was transferred back to the District Judge to whom it had been originally assigned and the order to show cause for alleged contempt was duly dismissed.

The above remarks are not intended to raise irrelevant or scandalous matters. It must be remembered that this case involves a claim for alleged violation of civil rights. The above circumstances may be a cause for invocation of Rule 17.1(a) of the Rules of The Supreme Court in respect to the District Court.

The appellant declines to pursue these matters as a legal issue in this case or otherwise. Instead, we prefer to interpret them as fraternal hazing.

B. Factual Background:

On August 25, 1977, John M. Ross, the appellant herein, who was then a resident and Citizen of the State of Michigan, entered into a land contract with a joint venture comprised of persons including Thomas W. Fowler and Dale W. Mitchell and their investors (hereafter called Fowler, et. al.). The August 25, 1977 contract concerns a single family residence located at San Diego County, California. Ross eventually migrated to San Diego.

The parties continued with their contract through December 2, 1977. On November 23, 1977, the appellant disputed certain written proposed change in plans and specifications sheets, especially in respect to proposed charges. A written demand was made that Fowler, et. al. verify that their proposed charges for the changes were correct according to the terms of the August 23, 1977 contract. Fowler, et. al.

declined to make such verification. Instead, on December 2, 1977, they notified the appellant by letter that they rescinded the August 25, 1977 contract.

The letter attempting rescission was received by Ross at his residence in Michigan. Upon receipt of it, a diversity complaint was prepared and filed with the U.S. District Court on December 20, 1977. A lis pendens was issued as to the real estate and it was filed with the San Diego County, California recorder on December 27, 1977.

Thomas W. Fowler, the managing partner for Fowler, et. al., has testified that he received a copy of the Complaint and Summons issued out of the District Court prior to December 31, 1977; and that he discussed them with his attorney prior to that date.

On January 10, 1978, Fowler, et. al. filed an action with the San Diego County Superior Court seeking rescission of the August 25, 1977 contract. The Superior

Court has ruled that it acquired jurisdiction over Ross on February 21, 1977, the date on which Ross filed a motion to dismiss and an answer. The motion to dismiss was based upon the allegation that there was a prior action pending between the same parties as to the same real estate. This allegation was also made in the answer.

The U.S. Marshal completed service on Fowler, et. al. on January 19, 1978.

The claim for rescission contained in the Superior Court action is pleaded verbatim as an affirmative defense by Fowler,et. al. in their answer to the complaint filed with the District Court.

The Superior Court declined to dismiss the duplicate case before it, or to stay its proceedings. Eventually, Fowler, et. al. sought to secure an injunction against Ross out of the Superior Court. Upon such request, Ross demanded an evidentiary hearing at which he proposed to prove (a) that

the Superior Court was without jurisdiction because there was a prior action pending between the same parties as to the same real estate, and (b) that Fowler, et. al. could not prove that they would succeed on the merits at trial. The attorneys for Fowler, et. al. objected to such a hearing "because it would be a mini-trial." When the hearing convened, Ross called Thomas W. Fowler as a witness, but the Superior Court refused to allow Ross to proceed and instead granted the requested injunction without the hearing. In the course of attempting to enforce this injunction, the Superior Court has continually declined to consider the challenge to its asserted jurisdiction, and it has caused the appellant to be incarcerated in the county jail with the general jail population.

When the above described conduct commenced, an action was filed against Fowler, et. al., their attorneys, and the respect-

ive Superior Court judges, requesting injunctive relief pursuant to 28 USC §2283, and 42 USC §1983, and damages pursuant to 42 USC §1983. The District Court declined to issue a preliminary injunction requested by Ross, claiming a lack of jurisdiction to be able to do so pursuant to 28 USC §2283.

While these matters were pending, a writ of prohibition was requested from the California Supreme Court, but the court declined to grant a hearing. Because of the belief that the District Court would not allow amendment of the original action in order to join the California Supreme Court as a party defendant, a second action was filed, service was completed, and a request for consolidation was made.

The District Court dismissed both of the cases and appeals were taken form the dismissals. Both appeals were argued at the same time. The Memorandum opinion of the Court of Appeals adopts the Order of

the District Court. The reasons given by the District Court for dismissal are:

1. the judicial defendants are immune pursuant to Stump v. Sparkman, 435 US 349 (1978),

2. the District Court was without jurisdiction to grant injunctive relief pursuant to 28 U.S.C. §2283,

3. Ross did not file an amended complaint that was satisfactory to the District Court.

The District Court also criticized the appellant for joining the original attorneys for Fowler, et. al. as parties defendant. Those original attorneys for Fowler, et. al. thereafter discontinued direct appearances on behalf of Fowler, et. al.

On July 22, 1981, the Court of Appeals denied appellant's request for rehearing en banc. No vote was taken pursuant to Federal Rule of Appellate Procedure 35(b). It is from the above that this appeal is made.

C. The Controlling Facts Per The Court Of Appeals.

At oral argument, the Court Of Appeals suggested that the controlling issue in this appeal is whether or not the action filed by Ross on December 20, 1977 in the District Court was in rem or quasi in rem, rather than in personam, however, the Court of Appeals never reached this issue.

At page 2, lines 16 to 18 of the July 20, 1979 Order of the District Court, which was adopted by the Court of Appeal, the District Court states:

> Plaintiff's motion for injunctive relief is denied without prejudice on the ground that the court lacked jurisdiction to grant the relief. See 28 U.S.C. §2283.

At page 2, lines 10 to 13 of the same Order, the District Court stated:

> As the Supreme Court has recently reaffirmed, judicial officers are immune from liability for their judicial acts, Stump v. Sparkman , 435 U.S. 349 (1978).

At page 2, lines 19 to 28 of the same

Order, the District Court stated:

> Two additional motions were heard on June 4, 1979: the motion to dismiss, or alternatively to strike, of the Fowler defendants; and plaintiff Ross' motion for an order disqualifying counsel for the Fowler defendants [per Comden v. Superior Court (1978) 20 Cal. 3d 906]. ... Ross ... was admonished that his motion to disqualify was entirely frivilous, and if further such motions were brought, attorney fees would be assessed.

Attention must be directed to the fact that the District Court acknowledged the law of Comden v. Superior Court, supra, 20 Cal. 3d 906, a California Supreme Court case. At oral argument, the District Court stated that he intended to follow the strong dissent of Comden, supra, rather than the majority opinion.

The above factual setting pertains to the actual motives for the District Court's Order of dismissal, especially considering the total failure to address the in rem vs. in personam issue.

The undisputed facts in this case in

respect to whether or not the action filed by Ross with the U.S. District Court on December 20, 1977 is "in rem" are:

1. The original Complaint filed on December 20, 1977 sets forth the vital terms of the land contract executed by Ross and Fowler, et. al., on August 25, 1977, and a copy of the land contract was attached to the original Complaint.

2. The ad damnum of the original complaint requests:

> "A. That this Court order that the defendants herein shall specifically perform the contract for the contruction and sale of said residence. ...
>
> F. That this Court issue appropriate orders so that a trustee or master appointed herein may secure documents for completion and occupancy of said residence and so that the plaintiff [Ross] may close the purchase of and occupy said residence. ...
>
> K. That the plaintiff have such other and further relief as shall be lawful and agreeable to equity and good conscience.

3. Ross filed a lis pendens upon the

title of the real estate involved in the original Complaint. The lis pendens was filed with the San Diego County Recorder on December 27, 1977 as Document Number 77-5[illegible]057.

4. Ross filed amended complaints by attempting to incorporate allegations in previous complaints into the new complaints. The District Court ordered that Ross file an integrated complaint. On June 16, 1978, Ross filed such an integrated complaint and titled it Fourth Amended Complaint.

5. The Fourth Amended Complaint contains alternative counts for breach of contract, conversion of escrow funds, fraud and deceit, interference with contractural and prospective business relationships, to quiet title to real estate, and for breach of fidiciary duty by the escrow holder; and the Fourth Amended Complaint requests:

(a) that the court order that the Fowler defendants specifically perform their

land contract with Ross by completing construction and conveying title to Ross.

(b) that the defendants be required to set forth their rights and the nature and virtue of their claims to the real property at suit, and that the court declare and adjudge that the plaintiff is the owner in fee simple of said real estate; and, that the defendants shall be permenantly restrained and enjoined from asserting any right or title or interest in said real estate.

(c) that the court declare the rights of the construction lender for Fowler, et. al. and declare such abatement as may be appropriate.

6. Upon motion by Fowler, et. al., the District Court ordered Ross to delete all parties and claims against parties other than the sellers on the basis that such parties were not necessary. An appeal was taken from this order. In that appeal, Ross claimed that the District Court was attempting to relegate his

Complaint to an action for damages. This appeal was not completed until September of 1980.

The Fowler defendants have argued that the Complaint filed by Ross on December 20, 1977 and the fact that Ross filed a lis pendens On December 27, 1977 are insufficient to permit characterization of the action in the U.S. District Court as being in rem or quasi in rem. Furthermore, they have argued that the dismissal of the Complaint by the District Court destroyed the nature of the action because there was no complaint before the court.

VI

IS THE FIRST ACTION IN REM OR QUASI IN REM?

Appellant has continually maintained that the pivotal question in this case is whether or not the action filed by Ross on December 20, 1977 is in rem or quasi in rem because, if it is, then, as a matter of both Federal law and California state law, the

San Diego County Superior Court would have no jurisdiction in the second duplicate suit filed with it on January 10, 1978. Such a result follows from the conflicts of law principal known as the first tribunal rule, also called the concurrent jurisdiction rule and the exclusive concurrent jurisdiction rule. A leading California case in this area is Cutting v. Bryan (1929) 206 Cal.254, cert. denied 280 U.S. 556. In this case, Bryan filed an action in the U.S. District Court seeking an adjudication as to title to property and appointment of a trustee. Cutting was a party to this first action. Thereafter, Cutting filed a second action in a California County Superior Court naming Bryan as a defendant. The same real estate was involved in both actions. Upon motion by Bryan, the second action in the County Superior Court was dismissed. In sustaining this dismissal, the California Supreme Court said, at 206 Cal. 257:

> [2] Insofar as this action has been insitutied by the plaintiff for the purpose of quieting her title as against the alleged adverse claims of the defendants, it must be held, in conformity with the general rule of comity established by a long line of authority, that the court which first takes the subject matter of a litigation into its control for the purpose of administering the rights and remedies with relation to specific property obtains thereby jurisdiction so to do, to the exclusion of the exercise of a like jurisdiction by other tribunals, the powers of which are sought to be invoked by parties and their privies to the original action. [Citations.]

In Penn General Casualty Co. v. Commonwealth of Pennsylvania, 294 U.S. 189, 55 S. Ct. 386 (1935), an action was filed in the U.S. District Court alleging misappropriation and waste of assets of Penn General Casualty Company. About two weeks later, a second suit was filed in a state court seeking to close the business of the company and the state court proceeded to issue an order restraining operation of the business. Thereafter, the District Court issued its order restraining the company and its officers from permitting any-

one to reveive or take possession of its property. In resolving this case, the Court states, beginning at 294 U.S. 195:

> [2,3] Where the judgment sought is strictly in personam, for the recovery of money or for an injunction compelling or restraining action by the defendant, both a state court and a federal court having concurrent jurisdiction may proceed with the litigation, at least until judgment is obtained in one court which may be set up as res adjudicata in the other. [Citations.] But, if the two suits are in rem or quasi in rem, requiring that the court or its officer have possession and control of the property which is the subject of the suit in order to proceed with the cause and to grant the relief sought, the jurisdiction of one court must of necessity yield to that of the other.
>
> ... [4,5] ... If the two suits do not have substantially the same purpose, and thus the jurisdiction of the two courts may not be said to be strictly concurrent, and if neither court can act effectively without acquiring possession and control of the property pendite lite, the time of acquiring actual possession may perhaps be the decisive factor. [Citation.] But, when the two suits have substantially the same purpose and the jurisdiction of of the courts is concurrent, that one whose jurisdiction and process are first invoked by the filing of the bill is treated as in constructive possession of the property and as authorized to proceed with the cause.
> [Emphasis added.]

In Rath Packing Company v. Becker, 9th Cir., Cal., 1975) 530 F2d 1295, the State of California sought to enjoin the sale of certain meat products, but Rath Packing sought to have the California statute that was the basis for the injunctive order declared un-Constitutional. At note 15, at 530 F2d 1306, the court states:

> Jones' argument that the District Court improperly assumed jurisdiction of a res already in the control of the state courts is without merit. Suits for injunctions are in personam, not in rem, Penn General Casualty Co. v. Pennsylvania, 294 U.S. 189, 195, 55 S. Ct. 386, 79 L. Ed. 850 (1935), and state and federal courts having concurrent jurisdiction are "free to proceed in [their] own way * * *, without reference to the proceedings in the other court. * * * The rule, therefore, has become generally established that where the action first brought is in personam and seeks only a personal judgment, another action for the same cause in another jurisdiction is not precluded. [Emphasis added.]

Reference to Black's Law Dictionary, Fourth Edition, page 900, provides us with the following definitions:

> IN REM. A technical term used to designate proceedings or actions

> instituted against the thing, in contradistinction to personal actions, which are said to be in personam. ...
>
> It is true that, in a strict sense, a proceeding in rem is one taken directly against property, and has its object is the disposition of property without reference to the title of individual claimants; but, in a larger and more general sense, the terms are applied to actions between parties where the direct object is to reach and dispose of property owned by them, or some interest therein. [Citation.]
>
> A proceeding "in rem" is in effect a proceeding against the owner, as well as a proceeding against the goods. ...
>
> QUASI IN REM. A term applied to proceedings which are not strictly and purely in rem, but are brought against against the defendant personally, though the real object is to deal with particular property or subject property to the discharge of claims asserted. ... Freeman v. Anderson, 7 S. Ct. 165, 119 U.S. 187, 30 L. Ed. 372. ...
>
> IN REM ACTIO EST PER QUAM REM NOSTRAM QUAE AD ALIO POSSIDETUR PETIMUS, ET SEMPER ADVERSUS EUM EST QUI REM POSSIDET. The action in rem is that by which we seek our property which is possessed by another, and is always against him who possesses the property.

In the present case, the issue is the characterization of the first suit filed. It is undisputed that the action in the U.S. District Court was the first suit filed by

either Ross or Fowler, et. al. Neither is it disputed that the object of this action in the District Court is to control possession of the real estate at suit. Thus, the action must be characterized as quasi in rem.

The above cases voice unanimous agreement, as a matter of general Federal law, California Federal law, and California State law, that the first tribunal rule, which is also called the concurrent jurisdiction rule and the exclusive concurrent jurisdiction rule, refers to actions that are in rem as well as those that are quasi in rem. It is only when an action is strictly in personam and seeks only a money judgment or injunctive relief that a second action may be filed. Furthermore, as we see from the Penn General Casualty case, supra, in this case the District Court acquired constructive possession of the real estate involved in this case on December 20, 1977, or twenty-one days before Fowler, et. al. filed their action in the San Diego Superior Court.

VII

THE IN REM EXCEPTION OF 28 U.S.C. §2283

The District Court ruled in this case that it lacked jurisdiction to grant an injunction because of 28 U.S.C. §2283, however, the court does not elaborate on its reasons for this conclusion. The Court of Appeals simply adopts the District Court's decision. Briefs to both courts raised the in rem exception to 28 U.S.C. § 2283, but both courts failed to address this issue.

In Mitchum v. Foster, 407 US 225 (1972) the Court discusses the exceptions to the anti-injunction act. Beginning at 407 US 233, last paragraph, the Court states:

> Despite the seemingly uncompromising language of the anti-injunction statute prior to 1948, the Court soon recognized that exceptions must be made to its blanket prohibition if the import and purposes of other Acts of Congress were to be given their intended scope. So it was that, in addition to the bankruptcy law exception that Congress explicitly recognized in 1875, the Court through the years found that federal courts were empowered to enjoin state court proceedings, despite the anti-injunction statute, in carrying

out the will of Congress. These covered a broad spectrum of congressional action: (1) legislation providing for removal of litigation from state to federal courts, (2) legislation limiting the liability of shipowners, (3) legislation providing for federal interpleader actions, (4) legislation conferring federal jurisdiction over farm mortgages, (5) legislation governing federal habeas corpus proceedings, and (6) legislation providing for control of prices.

In addition to the exceptions to the anti-injunction statute found to be embodied in these various Act of Congress, the Court recognized other "implied" exceptions to the blanket prohibition of the anti - injunction statute. One was an "in rem" exception, allowing a federal court to enjoin a state court proceeding in order to protect its jurisdiction over a res over which it had first acquired jurisdiction.

Thus, if the action filed by Ross on December 20, 1977 is in rem or quasi in rem, then the District Court had jurisdiction and it incorrectly ruled that an injunction could not be granted. Attention is directed to the fact that the court did not rule that it would not issue an injunction. Instead, the court ruled that it could not issue an injunction.

VIII

APPLICATION OF 42 USC §1983 ET. SEQ.

Application of 42 USC §1983, et. seq. in this case entails application of the above conclusion that the San Diego County Superior Court is acting without jurisdiction, as well as by utilization of the conflicts of law principle known as renvoi.

42 USC §1983, et. seq. (hereafter called §1983) permits a party to seek injunctive relief to redress the deprivation, under color of any state law, statute, ordinance, regulation, custon or usage, of any right, priviledge or immunity secured by the U.S. Constitution or by any Act of Congress for equal rights of citizens and of all other persons within the jurisdiction of these United States.

Furthermore, an action under §1983 is an express Congressional exception to the anti - injunction statute, as is seen from Mitchum v. Foster (1972) 407 U.S. 225, 242:

This legislative history makes evident that Congress clearly conceived that it was altering the relationship between the States and the Nation with respect to the protection of federally created rights; it was concerned that state instrumentalities could not protect those rights; it realized that state officers might, in fact be antipathetic to the vindication of those rights; and it believed that these findings extended to the state courts.

V.

Section 1983 was thus a product of vast transformation from the concepts federalism that had prevailed in the late 18th century when the anti-injunction statute was enacted. The very purpose of §1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights - to protect the people from unconstitutional action under color of state law "whether that action be executive, legislative , or judicial." Ex parte Virginia, 100 US at 346, 25 L Ed at 679. In carrying out that purpose, Congress plainly authorized the federal courts to issue injunctions in §1983 actions, by expressly authorizing a "suit in equity" as one of the means of redress. ...

In Henry v. First National Bank of Clarksdale (5th Cir., Miss., 1979) 595 F2d 291, a §1983 action, the court states at 595 F2d 300:

[5,6] Appellants next argue that the

> Anti-Injunction Act, 28 U.S.C. §2283 (1976), prohibited issuance of the district court's injunction delaying enforcement of the state court judgment by the state plaintiffs. ...
>
> This section [§1983], however, poses no bar to the order under consideration, for the order plainly falls within one of the statutory exceptions to section 2283. After carefully reviewing the history and policies underlying section 2283 the Supreme Court held in Mitchum v. Foster, 407 US 225, 92 S.Ct. 2151, 32 L.Ed.2d 705 (1972), that section 1983 satisfies the requirements of the first exception to section 2283 as an express congressional authorization to intervene in state court proceedings in order to protect federal rights. ...

In the present case, neither the District Court nor the Court of Appeals reached the above issue, although it was plainly presented to the courts.

Application of §1983 in the present case is as follows:

1. By application of the first tribunal rule, the U.S. District Court has had exclusive jurisdiction in respect to the real estate and parties involved in the action filed by Ross on December 20, 1977.

The consequence is that the San Diego County Superior Court has had no jurisdiction over said real estate or parties.

2. The failure to apply the first tribunal rule results in a violation of the 14th Amendment of the U.S. Constitution wherein it is provided:

> ... nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

3. It is submitted that since the San Diego County Superior Court is without jurisdiction, its entire proceedings are a total denial of due process.

4. The continual refusal of California courts to apply the California "State law" first tribunal rule in respect to a diversity litigant from another State results in unequal protection of the law. In blunt terms, it is discrimination against newcomers and outsiders.

Application of civil rights law as

outlined in this case may initially seem harse, however, a careful analysis should dispel doubt as to the need to apply civil rights law in this case. The continuance of diversity jurisdiction, despite the loud debate to do away with it in recent years, voices a Congressional intent to retain diversity jurisdiction because of the fact and fear that local courts are subject to local prejudices against newcomers and outsiders and will engage in unequal protection of the laws. The charge that California might be engaging in unequal protection of the law should not be offensive as there is a long litany of cases sustaining such a conclusion.

The most brutal violation of due process in these matters is the continual refusal of California courts to even consider the prospect that they may be divested of jurisdiction because of exclusive in rem diversity jurisdiction. It may be paradoxical

that the court in Sea World Corporation v. Superior Court (4th Dist., San Diego, 1973) 34 Cal. App. 3d 494, stated in note 2, at page 499:

> "Assume" too, is hardly the just word, since the court either has or has not jurisdiction. "Assume a jurisdiction if you have it not" would be inapt advice to a court.

Nevertheless, because of the total dearth of any deliberative opinion from any California court, we are confronted with a situation where it is assumed that California State courts have jurisdiction and that some sort of redemption must be administered in the event of an error.

The most shocking incidence of this assumption of jurisdiction is that the San Diego Superior Court insists that it has power to and it has incarcerated the appellant, but the court has continually declined to review the question of whether or not it has jurisdiction to proceed at all. The court that opted for incarceration had a

reputation for creating such spectacles with members of the bar, but this practice seemed to abate after he was joined as a party defendant in this case.

IX

CALIFORNIA'S FIRST TRIBUNAL RULE

The reason why California state law is relevant in this case is because of the claim that there is flagrant unequal protection of the law in respect to a diversity litigant in violation of the 14th Amendment of the U.S. Constitution. The respondents in this appeal have actually argued to the courts that, if California courts simply ignore the first tribunal rule in this case, then the appellant will eventually fade away.

A. WHEN JURISDICTION ATTACHED.

The question of when jurisdiction is acquired by a federal court was answered in Penn General Casualty Co. v. Pennsylvania, supra, 294 U.S. 189:

> [4,5] ... when the two suits have have substantially the same purpose

> and the jurisdiction of the courts is concurrent, that one whose jurisdiction and process are first invoked by the filing of the bill is treated as in constructive possession of the property and as authorized to proceed with the cause.

In Rath Packing Co. v. Becker, supra, (9th Cir., Cal., 1975) 530 F2d 1295, the court states at page 1306:

> These federal questions were first taken into control of a [U.S. District] court when Rath filed its complaint in the district court.

In Mallon v. Lutz (1963, D.C., E.D. Mich., S.D.) 217 F. Supp. 454, the court says at page 455:

> [1] 1. The existence of diversity of citizenship is to be determined as of the time the suit is commenced. Smith v. Sterling, 354 U.S. 91, footnote 1, page 93, 77 S.Ct 1112, p. 1113, 1 L Ed 2d 1205 (1957).

Smith v. Sterling, supra, 354 US 91, is a case originating out of the Southern District of California. The Court states that diversity jurisdiction is established when a case is commenced and is not destroyed if domicile is latter changed.

The leading case in California regarding the first tribunal rule is Scott v. Industrial Accident Commission, 46 C2d 76 (1956), where, at 46 C2d 87, the court cites with approval the case of Simmons v. Superior Court, 96 Cal. App. 2d 119. In Simmons v. Superior Court, supra, at 96 Cal. App. 2d 128, the court states:

> [8] The law of Texas determines when the Texas Court acquired jurisdiction of the controversy. [Citation.] Under the law of Texas where a petition is filed and process of the court is invoked thereon, even though such process is not served upon the defendant, the court thereby acquires jurisdiction of the subject matter. [Citation.]

Thus, as a matter of Federal law, the U.S. District acquired jurisdiction of the case filed with it on the date it was filed - on December 20, 1977. Thus, as a matter of California state law, California state courts acknowledge and apply the federal rule as to when jurisdiction attaches. The result is that the U.S. District Court acquired jurisdiction about 20 days before

Fowler, et. al. filed their action in the San Diego County Superior Court as to the same real estate and parties. This result is not harsh. We must remind ourselves that Thomas W. Fowler, the managing partner for Fowler, et. al., testified that he actually received copies of the Summons and Complaint issued out of the District Court prior to December 31, 1977, and that he discussed them with his attorney prior to December 31, 1977. Thus, it is moot that Fowler, et. al. and their attorney did not realize that a race to service was in vain. We are also reminded that the Superior Court has ruled that it acquired jurisdiction over Ross on February 21, 1978 and that the U.S. Marshal served Fowler, et. al. on January 19, 1978 so that the race to service issue is moot.

B. STATE COURT VS. STATE COURT

The leading case in California as to the first tribunal rule is Scott v. Industrial Accident Commission, 46 C2d 76 (1956)

where, at page 81, the court says:

> [1] General principles applicable to controversies in which the same parties and the same subject matter are involved are these: When two or more tribunals in this state have concurrent jurisdiction, the tribunal first assuming jurisdiction retains it to the exclusion of all other tribunals in which the action might have been initiated. [2a] Thereafter, another tribunal, although it might originally have taken jurisdiction, may be restrained by prohibition if it attempts to proceed. [Citation.] One reason for the rule is to avoid unseemly conflict between courts that might arise if they were free to make contradictory decisions or awards at the same time or relating to the same controversey; another reason is to protect litigants from the expense and harassment of multiple litigation.

C. CALIFORNIA COURT VS. ANOTHER STATE'S COURT

In Scott v. Industrial Accident Com., supra, at 46 C2d 87, the court cites with approval the case of Simmons v. Superior Court, supra, where at pages 124-5 we find:

> [5] The rule that forbids a later action in the same state between the same parties involving the same subject matter rests upon principles of wisdom and justice, to prevent vexation, oppression and harrassment, to prevent multiplicity of suits - in short, to prevent two actions between the same parties involving the same

subject matter from proceeding independently of each other. We think that there is no distinction in reason or difference in principle between a case where the latter action between the same parties involving the same subject matter is commenced in another state. If proceedings should be stayed in the first case mentioned, it is to avoid multiplicity of suits and prevent vexatious litigation, conflicting judgments, confusion and unseemly controversy between litigants and courts. Any and all of this may occur where the later action is commenced in another state as well as where it is commenced in the same state. (14 Am. Jur. §243, p. 436.)

D. CALIFORNIA COURT VS. FEDERAL COURT

In Simmons v. Superior Court, supra, at 96 Cal. App. 2d 124, the court says:

In conformity with the rule of comity a federal court "which first takes the subject matter of a litigation into its control for purposes of administering the rights and remedies in relation to specific property (mining claims) obtains thereby jurisdiction so to do, to the exclusion of the exercise of a like jurisdiction by other tribunals (a California court) the powers of which are sought to be invoked by the parties or their privies to the original action." Cutting v. Bryan, 206 Cal. 254, 257 (274 P. 326), cert. denied 280 US 556 (50 S Ct 16, 74 L Ed 611.)

. . . .

E. IN REM VS. IN PERSONAM DISTINCTION

In Scott v. Industrial Accident Com., supra, at 46 C2d 76, the court says:

> [13] Also, reliance is placed by the commission upon the above quotation from 15 Corpus Juris, 1165, 54 Cal. App. 571, 575-576, concerning limitation of the concurrent jurisdiction rule to "actions which deal either actually or potentially with specific property or objects." [Citiation.] In this state, however, as indicated hereinabove, the rule has likewise been applied to actions in which only a personal judgment is sought. (See M.H. Golden Const. Co. v. Superior Court (1950), supra, 98 Cal. App. 2d 811, 815-816[accounting, money judgment]; Gorman v. Superior Court (1937), supra, 23 Cal. App. 2d 173, 177 [automobile collision damages]).

In California Union Insurance Co. v. Trinity River Land Company, Inc. (1980, 3d Dist.) 105 Cal. App. 3d 104, the court says:

> [2a] The controlling rule in this case, however, is that the pendancy of another action growing out of the same transaction (here, the insurance contract and the fire) is ground for abatement of the first. [Citation.] The underlying theory of the plea of another action pending is that the first action will normally be an ample remedy, and the second action (here, the Shasta County suit) is therefore unnecessary and vexatious.

F. SECOND ACTION PRESUMED TO BE VEXATIOUS

As we have seen in California Union Insurance Co. v. Trinity River Land Company, Inc., supra, (1980) 105 Cal. App. 3d at 108:

> [2a] ... the first action will normally be an ample remedy, and the second action ... is therefore unnecessary and vexatious.

G. POLICY OF THE CALIFORNIA LAW.

The policy considerations underlying the California first tribunal rule are set in Simmons v. Superior Court, supra, 96 Cal. App. 2d at 130:

> Equity abhors a multiplicity of actions. "It is the policy of the law to reduce to the minimum the number of actions which may subsist between the same parties. [Citations.] Courts should not be in collision. they should be liberal and just in determining questions which involve conflicts of jurisdiction. Races between parties likely to result in unseemly controversy between courts of different states should be frowned upon and avoided if possible. It is the duty of the court to give preference to principles and methods of procedure by which the tribunals of the state may cooperate as harmonious members of the judicial system ... A conflict of authority should not occur if it can be avoided. Courts should compose rather than irritate." Our courts do

> not stand in the same relation to each other that foreign countries do. They are members of the same family, and section 1, art. 4, of the Constitution of the United States requires each state to give full faith and credit to the judicial proceedings of every other state. Comity between states is daily growing and should be encouraged.

The comity that the court refers to is fulfilled by enactment of the numerous uniform acts by the various states. It is submitted that this movement of comity may step backward if the San Diego County Superior Court is granted a license to serve its constituents first and comity second or not at all.

H. CONCLUSION: CALIFORNIA STATE LAW

Fowler, et. al. are seeking to attain the right to proceed with two actions as a matter of federal law when their own state precludes them from their second action as to the same real estate and parties. The unfortunate circumstance in this case is that the San Diego County Superior Court did not apply California law because it

continually declined to proceed with a hearing on the question of jurisdiction, but, instead, insisted and "assumed" that it had jurisdiction. More recently, the Superior Court has stated that it believes that it has the power to quash the lis pendens in these matters issued out of the U.S. District Court; and there may be no end to the power of the San Diego county Superior Court.

The first tribunal rule is not new or unique in California. It has long been codified at California Code of Civil Procedure §430.10 (a) and (c), which state:

> The party against whom a complaint or cross-complaint has been filed may object by demurrer or answer as provided in Section 430.30, to the pleading on any one or more of the following grounds:
>
> (a) The court has no jurisdiction of the subject of the cause of action alleged in the pleading. ...
>
> (c) There is another action pending between the same parties on the same cause of action.

California Code of Civil Procedure

§430.30(c) allows a party to file an answer and demurrer at the same time.

X

STUMP v. SPARKMAN

The problem in this case may not be the first tribunal rule as much as it is a practical predicament evolving from Stump v. Sparkman (1978) 435 U.S. at 357, note 7:

> In Bradley, the Court illustrated the distinction between lack of jurisdiction and excess of jurisdiction with the following example: if a probate judge, with jurisdiction over only wills and estates, should try a criminal case, he would be acting in clear absence of jurisdiction and would not be immune from liability for his action; however, on the other hand, if a judge in a criminal court should convict a defendant of a nonexistent crime, he would merely be acting in excess of his jurisdiction and be immune. Id., at 352.

The fact that the San Diego County Superior Court is acting where there is a total dearth of jurisdiction as a matter of California State law is seen from Scott v. Industrial Accident Commission, supra, 46 C2d at 78, where the court says:

> [4] In other words, as already indicated, the only point of concurrent jurisdiction of the two tribunals appears to be jurisdiction to determine jurisdiction, jurisdiction once determined will be exclusive, not concurrent.

Ergo, the Court is being asked to extend Stump v. Sparkman, (1978) 435 US 357, by ruling that all or some of the judicial defendants in this case are not immune from liability for their conduct because of the federal and/or California first tribunal rule. This issue seems to be the ultimate federal question passed on to the Court.

It is submitted that this issue is of substantial public importance because some sectors read Stump v. Sparkman, supra, as creating a rule of absolute immunity with no exceptions.

XI

THE CALIFORNIA SUPREME COURT

The reason that a second action was filed in these matters to sue the California Supreme Court was that the District

Court expressed an unequivoal attitude of judicial immunity. Thus, a petition for leave to file an amended complaint in the original action in order to join the California Supreme Court as a party defendant seemed to be a vain concept. Instead, it seemed more practical to file a second law suit, obtain service, and move to consolidate the two actions.

Furthermore, the District Court is known to employ procedural devices to prevent the filing of pleadings.

The reason for inclusion of the California Supreme Court in these matters may be best explained by reference to Gonzalez v. Consejo Nacional De Producion De Costa Rica (9th Cir., Cal., 1980) 614 F2d 1247 at 1250, where the court says:

> [1] ... In Threlkeld v. Tucker, 496 F 2d 1101, 1103 (9th Cir.), cert. denied 419 U.S. 1023, 95 S. Ct. 499, 42 L. Ed. 2d 297 (1974), this court described the reach of this statute:
>
> "The jurisdiction of the California

courts is therefore conextensive with the outer limits of due process under the state and federal constitutions, as those limits have been defined by the United States Supreme Court."

Continuing at 614 F2d 1256:

There is no question of the discretion on the part of the court when a motion is under Rule 60 (b) (4).... Either a judgment is void or it is valid. Determining which it is may present a difficult question, but when the question is resolved, the court must act accordingly...[12] Because it is clear from the record that the District Court did not have personal jurisdiction over Consejo and the judgment was, therefore, void, the District Court had a non-discretionary duty to grant relief from the default judgment.

Also, in Havemeyer v. Superior Court,

(1890) 84 Cal. 327, 401, the court said:

It is next suggested that the writ of prohibition does not issue ex debito jursitiae, but is to be granted or withheld, in the sound discretion of the court, and that in this case it ought not be allowed in favor of these petitioners, because they are members of the sugar trust, monopolists, and are the tempters who seduced the American Sugar Refinery into the combination.

There is no competent proof before us of these facts; but assuming them to be so, the law is not such as counsel claim it to be. A Decision may be found

> here and there saying in a loose way that issuance of the writ is in the discretion of the court, and a statement, in general terms, to the same effect, may be cited from text writers, who merely echo the decisions, but it never was the law that a court having jurisdiction to issue the writ had any discretion to refuse it when demanded by the real party in interest bringing himself clearly within the law. If such an idea has obtained anywhere, it has been in consequence of a misunderstanding of the English cases.

In Jacobson v. Tahoe Regional Planning Agency (9th Cir., Cal. 1977) 566 F2d 1353, at 1366, the court said:

> [26] The immunity afforded governmental officers for damage suits does not defeat a claim for equitable relief.

In the present case, the appellant has been claiming that deliberative review and decision upon the question of jurisdiction is a non-discretionary duty of the California courts. The simple assertion, or the "assumption" that the California courts have jurisdiction is inadequate. Due process, i.e. a deliberative hearing regarding jurisdiction, is not discretionary. To

4

date, all California courts have declined to entertain the threshold question of the jurisdiction of the San Diego County Superior Court, especially in the context of the first tribunal rule.

The failure of the California state courts to consider this challenge to jurisdiction is considered to be a violation of the due process requirements of the 14th Amendment of the U.S. Constitution.

The failure of the Court of Appeals to address the jurisdiction question, and to apply Gonzalez v. Consejo Nacional Produccion De Costa Rica, supra, 614 F2d 1247, and Jacobson v. Tahoe Regional Planning Agency, supra, 566 F2d 1353, in a consistent manner, or to modify or overrule them, is considered to be a violation of 5th Amendment of the U.S. Constitution, however, the longer answer may be that the Ninth Circuit is submitting the immunity issue to the Court.

. . . .

XII

WAIVER OR ABSTENTION

The fact that a federal court has the power to waive its jurisdiction is conceded, the most common exercise of the power being an order of extradition. Beavers v. Hanbert, 198 US 77, 49 L. Ed. 950, 25 S. Ct. 573,575.

However, in the present case, there has never been a request for waiver and the District Court has never issued an order, judgment or other pleading of any sort in this case exercising the power of waiver. A suggestion that the court will do so is at most speculative.

The District Court's power of abstention was addressed in Rath Packing Company v. Becker, supra, (9th Cir., Cal., 1975) 530 F2d 1295 at 1307:

> [10-12] In applying the abstention doctrine a federal court has discretion in declining to exercise or postponing the exercise of jurisdiction it already has in deference to a state court resolution of underlying issues of state law. Railroad Comm'n of Texas v. Pullman Co., 312 US 496, 61 S. Ct.

643, 85 L. Ed. 971 (1941). Abstention is appropriate only where the issue of state law is uncertain. Harman v. Forssenius, 380 US 528, 85 S. Ct. 1177, 14 L. Ed. 2d 50 (1965), and where "the delay and expense to which the application of the abstention doctrine inevitably gives rise" can be justified. England v. Board of Medical Examiners, 375 US 411, 418, 84 S. Ct. 461, 11 L. Ed. 2d 440 (1964). However, abstention is not automatic whenever a question of state law may be involved.

. . . .

. . . .

Thus, in the present diversity case, abstention is not automatic. Furthermore, the District Court has not issued an order or other pleading expressing an intention to abstain from the exercise of its jurisdiction and setting forth a legal basis for doing so as required by the Court.

In Joiner v. City of Dallas, D.C. Tex. (1979) 380 F. Supp. 754, affirmed 419 U.S. 1042, 95 S. Ct. 614, 42 L. Ed. 2d 637, rehearing denied 419 U.S. 1132, 95 S. Ct. 818, 42 L. Ed. 2d 831, the rule was clarified to be that to require abstention on the ground of

avoiding federal-state friction that might result from federal adjudication of unsettled issues of state law, the anticipated collision between state and federal sovereigns must be significant, not picayune, and its likelihood must be real, not fanciful.

In Wall v. American Optometric Association, Inc., D.C. Ga. (1979) 379 F. Supp. 175, affirmed 419 U.S. 888, 95 S. Ct. 166, 42 L. Ed. 2d 134, rehearing denied 419 U.S. 1061, 95 S. Ct. 648, 42 L. Ed. 2d 659, the rule on abstention was further clarified by promulgation of the law that abstention should be exercised only in those rare instances when the District Court believes that it would further the goals of federalism without interfering with Congress' intention to provide a federal forum.

There is no order, memorandum or other pleading issued by the District Court setting any of the above criteria as a basis for abstention.[1]

1. Because of the circumstances described at pages 7-8 of the brief, recusal is now required.

Instead of waiving or abstaining from the exercise of jurisdiction, the federal courts have continually exercised the jurisdiction arising out of the December 20, 1977 lawsuit in the following manner:

1. On January 31, 1978, Fowler, et. al. filed a motion in the U.S. District Court requesting dismissal of the diversity action filed on December 20, 1977, or, in the alternative, for transfer of venue to San Diego.

2. On February 27, 1978, the District Court ruled that it had diversity jurisdiction and transferred venue to the Southern District of California at San Diego.

3. On March 20, 1978, Fowler, et. al. filed their Answer to Ross' Complaint that was filed in the District Court on December 20, 1977, and that answer asserts an affirmative defense exactly the same as the Complaint filed by Fowler, et. al. with the San Diego County Superior Court.

4. On June 14, 1978, the District Court at San Diego ordered Ross to file an amended, integrated complaint in compliance with Rule 4(k), Fed. Rules of Civil Proc., and said amended, integrated complaint was filed with the court on June 16, 1978.

5. The District Court issued an Order Regulating Discovery And Pretrial Proceeding dated July 14, 1978, wherein attorneys for the respective parties were ordered to (i) complete discovery by October 16, 1978, (ii) convene an attorneys conference by no later than October 20, 1978, (iii) file the Memorandum Of Contentions Of Fact And Law by October 23, 1978, (iv) submit a Proposed Final Pretrial Conference Order by November 1, 1978, (v) attend a Final Pretrial Conference on November 6, 1978, and (vi) appear for jury trial on November 14, 1978.

6. Ross complied with every aspect of Order described in paragraph 5, immediately above and presented himself as being ready

to proceed to trial on the Complaint that had been Answered by Fowler, et. al., however, the attorney for Fowler, et. al. did not comply with the above Order in any respect; and, when the Final Pretrial Conference was called on November 6, 1977, the District Court thereupon continued the case without date.

7. An interlocutory appeal had been filed in respect to the District Court's ruling that Ross would not be allowed to include the construction lender of Fowler, et. al. as an interested party in the suit to quiet title. Ross indicated on November 6, 1978 that he would voluntarily dismiss this appeal pursuant to Rule 42 of the Federal Rules of Appellate Procedure so that the case could immediately proceed to trial, however, the District Court ignored this offer and, instead, ruled that it was without power to act in any manner while the interlocutory appeal was pending.

8. The Ninth Circuit Court of Appeals heard the appeal and ruled upon it.

9. Upon remand to the District Court during September of 1980, Ross filed a new integrated complaint and served it upon the attorneys for Fowler, et. al., but no answer was timely filed. Ross then moved for a default judgment, or in the alternative, for an order directing Fowler, et. al. to file an immediate answer, and to set the case in the District Court for immediate trial, and these motions were taken under advisement in January of 1981.

10. Fowler, et. al. have recently argued in the San Diego County Superior Court that it will be inequitable to consider granting Ross specific performance because Fowler, et. al. will thereby incur losses as a result of holding the real estate for the last four years (since 1977); and they have further argued that Ross should not be granted a jury trial as to the claim of

Fowler, et. al. for rescission, and when confronted with California State law to the effect that Ross has an absolute right to such a jury trial in a rescission action (Radinsky v. T.W. Thomas, Inc. (1968) 264 Cal. App. 2d 75, 79), the attorneys for Fowler, et. al. have argued that their action for rescission should be recharacter-acterized as an equitable action in which Ross may not be entitled to a jury trial.

As can be seen from the above scenario of facts, there is no order or other pleading issued by the District Court expressing an intention to waive or abstain from the exercise of jurisdiction. Instead, there are circumstances evidencing the continued exercise of jurisdiction. As we have seen from Penn General Casualty Co. v. Pennsylvania, supra, 294 US 189 at 192-193, it is possible for the District Court to proceed even after the San Diego County Superior Court has acted. The purpose of the frist

tribunal rule is to avoid this potential conflict.

XIII

FAILURE TO ALLEGE JURISDICTIONAL STATUTE

A reason given by the Court of Appeals for sustaining the District Court is that the appellant did not allege 28 USC §1983 as the jurisdictional statute for the 42 USC §1983 action. Instead, only 42 USC §1983, et. seq. was cited as the jurisdictional basis for the action in the District Court. Thus, the entire action was allowed to be dismissed. The fact that the basis of the appeal was to sustain the in rem exception of 28 USC §2283 and the first tribunal rule was ignored.

The Court of Appeals was directed to the case of Wong v. Bacon (D.C., N.D. Cal. 1977) 445 F. Suppl. 1177 and Sanborn v. U.S. (D.C., E.D. Cal., 1978) 453 F. Suppl. 651. In the Sanborn case, supra, the court says

the following at 453 F. Suppl. 651:

> This Circuit has taken the rather liberal position that "... if the facts giving the court jurisdiction are set forth in the complaint, the provision conferring jurisdiction need not be specifically pleaded." Williams v. United States, 405 F2d 951, 954 (9th Cir., 1969) In the present case ... [f]acts supporting jurisdiction do appear in the plaintiff's complaint ... and little would be gained by requiring plaintiffs to amend their complaint to include a statement of jurisdiction.

The above law of the Ninth Circuit was not applied, modified or overruled in this case. Again, we seem to have an inconsistent application of the law by the California courts, which would be a violation of the due process provisions of the Fifth Amendment of the U.S. Consittution. Again, however, the longer answer may be that the Circuit has deferred the immunity issue to the Court.

XIV

SANCTIONS

The District Court ordered sanctions

of over $4,000.00 against the appellant in the course of dismissing these actions. No statement of costs or time spent was requested by the court or submitted to the court.

It thus appears that the sanctions are intended solely to be a penalty as they are not related to costs or expenses.

An issue in this case is whether or not the attorney for Fowler et. al. has participated in abuse of process and malicious prosecution. The District Court has openly expressed its displeasure with this aspect of the case. However, evidence exists that said attorney has continually engaged in frivilous, onerous, oppressive and dilatory litigation tactics. Court records and newspaper accounts report that this attorney has been personally involved as a defendant in 23 lawsuits from 1964 through 1979, and that he has extensively employed frivilous, onerous, oppressive, and dilatory cross-complaints and tactics. The exposure

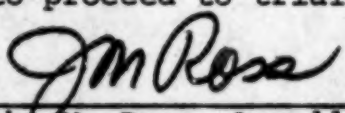
of these practices became a public record when this attorney recently filed an ostensibly frivilous cross-complaint in a suit. An altercation broke out concerning the frivilous cross-complaint and the attorney was killed, whereupon the history of his practice and tactics was disseminated.

XV

SUMMARY AND CONCLUSION

The U.S. District Court has exclusive in rem diversity jurisdiction and the San Diego County Superior Court has no jurisdiction. The District Court should be directed that it may enjoin the proceedings of the Superior Court in accordance with the in rem exception of 28 USC §2283.

Since the Superior Court has no jurisdiction, its proceedings are in violation of due process and are actionable pursuant to 42USC§1983, and the District Court should be directed to proceed to trial thereon.



John M. Ross, Appellant Pro Se

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN M. ROSS, Plaintiff-Appellant, v. JUDGES ALFRED LORD, ROSS G. THARP, PAUL EUGENE OVERTON, FRANKLIN B. ORFIELD and their alternates and successors, Honorable San Diego County Superior Court Judges, and THOMAS W. FOWLER, DONNA M. FOWLER, DALE L. MITCHELL aka D.W. MITCHELL, JANET P. HALL, MARTIN A. KENNEDY, SHARON L. KENNEDY, et. al. Defendants-Appellees.	No. 79-3509 Filed Jul 22, 1981 ORDER

Before: BROWNING, Chief Judge, FERGUSON, Circuit Judge, WILLIAMS,*District Judge

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and

no judge has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

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* Honorable Spencer M. Williams, District Judge, United States District Court for the Northern District of California, sitting by designation.

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN M. ROSS, Plaintiff-Appellant, v. JUDGES ALFRED LORD, ROSS G. THARP, PAUL EUGENE OVERTON, FRANKLIN B. ORFIELD and their alternates and successors, Honorable San Diego County Superior Court Judges, and THOMAS W. FOWLER, DONNA M. FOWLER, DALE L. MITCHELL aka D.W. MITCHELL, JANET P. HALL, MARTIN A. KENNEDY, SHARON L. KENNEDY, et. al., Defendants-Appellees.	No. 79-3509 D.C. No. CV 79-0226 HBT MEMORANDUM Filed May 18, 1981

Appeal from the United States District Court for the Southern District of California

Honorable Howard B. Turrentine, District Judge, Presiding

Argued and Submitted May 5, 1981

Before: BROWNING, Chief Judge, FERGUSON, Circuit Judge, WILLIAMS,*District Judge

The district court correctly dis-

missed appellant's complaint for failure to establish jurisdiction. 28 U.S.C.§2283 and 42 U.S.C §1983 are not jurisdictional statutes. Even had the complaint cited 28 U.S.C.§1343(3), the jurisdictional counterpart to §1983, dismissal would have been required because the complaint failed to specify what federal "right, priviledge or immunity" was abridged, and in what manner defendants acted "under color" of any state law, statute or regulation. See Briley v. California, 564 F.2d 849, 853-54 (9th Cir. 1977). It is unnecessary to consider other issues raised by appellant.

The motion for an award for attorney fees on appeal is denied.

AFFIRMED.

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* Honorable Spencer M. Williams, District Judge, United States District Court for the Northern District of California, sitting by designation.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

JOHN M. ROSS, Plaintiff,	)	Case No. 79-226-T
v.	)	O R D E R
SAN DIEGO SUPERIOR COURT JUDGES, et. al. Defendants.	)	Filed Jul 20, 1979

This action was filed by plaintiff John M. Ross, an attorney licensed to practice law in the State of California, acting in propria persona, on March 6, 1979. The case involves a claim for alleged violation of civil rights by two groups of defendants. One group of defendants is comprised of judges of the Superior Court in and for the County of San Diego, namely, Alfred Lord, Ross G. Tharp, Paul Eugene Overton and Franklin B. Orfield, (hereinafter the judicial defendants). The other group is comprised of several individuals and corporations, namely, Thomas W. Fowler,

Donna M. Fowler, Dale W. Mitchell aka D.W. Mitchell, Janet P. Hall, Martin A. Kennedy, Sharon L. Kennedy, Fowler & Mitchell Development, Richard Crake, Marc Homme and Philip Cohen, (hereinafter the Fowler defendants).

On April 12, 1979 plaintiff filed an amended complaint adding the Honorable Raul Rosado as a party defendant.

On May 14, 1979, hearing was held on the motion to dismiss and motion to strike of the judicial defendants (with the exception of Rosado who was never served) and on plaintiff's motion for injunctive relief. The court granted the defendants' motion to dismiss the first amended complaint on the ground that no basis for jurisdiction was stated, and that the complaint failed to properly state a claim for which plaintiff could be entitled to relief. [Emphasis added.] As the Supreme Court has recently reaffirmed, judicial

are immune from liability for their judicial acts, Stump v. Sparkman, 435 U.S. 349 (1978). By order filed on June 15, 1979, confirming the oral order made in court on May 14, 1979, plaintiff was granted leave to amend within 20 days. Ross failed to comply. Plaintiff's motion for injunctive relief was denied without prejudice on the ground that the court lacked jurisdiction to grant the requested relief. See 28 U.S.C. §2283.

Two additional motions were heard on June 4, 1979: the motion to dismiss, or alternatively to strike, of the Fowler defendants; and plaintiff Ross' motion for for an order disqualifying counsel for the Fowler defendants. The motion to dismiss was granted with leave to amend within 20 days; Ross was denied an extension on the earlier 20 day period as relates to the judicial defendants and was admonished that his motion to disqualify was entirely

frivilous, and that if further such motions were brought attorney fees would be assessed. An order was entered granting defendants' motion on June 13, 1979. Plaintiff failed to amend within the time period.

On June 11, 1979, plaintiff Ross brought for hearing a motion to file an amended complaint, a motion for a protective order or alternatively for an order permitting the deposit of certain evidence with the United States marshal, and a motion for rehearing on his request for injunctive relief.

Ross wilfully failed tc appear at the hearing, and notified this court by letter of his intention to avoid appearance. An order was subsequently filed (June 13, 1979) denying plaintiff's motion for leave to file an amended complaint without prejudice and denying all other motions heard on June 11.

On July 16, 1979, the judicial defen-

dants moved to strike the first amended complaint as to Rosado, and for entry of final judgment dismissing the action with prejudice as to the judicial defendants on the ground that plaintiff failed to comply with the court's order allowing 20 days in which to amend. Dismissal of the action for failure to comply with the court's order is an appropriate remedy. See Agnew v. Moody, 330 F.2d 868 (9th Cir. 1979).

Ross again failed to appear. Certain papers were delivered to the court by U.S. mail on July 16. These papers included a motion for leave to file a third amended complaint, a copy of the third amended complaint, and a petition for an ex parte order sealing the clerk's file in the case from public access. Defendants' motion was taken under advisement.

After full and thorough consideration of the pleadings on file in this case, careful review of the proposed amended

complaints, and hearing of oral argument on the various motions, as well as consideration of plaintiff's history of non-compliance with court orders both in this case and a related case in this court (see Ross v. Fowler, Civ. No. 78-161-T), it is hereby ordered that:

1. Final judgment is entered dismissing the action with prejudice as to the judicial defendants; and

2. Final judgment is entered dismissing the action with prejudice as to the Fowler defendants.

IT IS SO ORDERED.

Dated: July 20, 1979.

/s/ Howard B. Turrentine
United States District Judge

COPY TO:

[Counsel of record.]

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN M. ROSS,	) No. 80-5223
Plaintiff-Appellant,	) Filed Jul 22, 1981
v.	)
SAN DIEGO COUNTY SUPERIOR COURT, et. al.,	) ORDER

Before: BROWNING, Chief Judge, FERGUSON, Circuit Judge, WILLIAMS,*District Judge

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

* [Sitting by designation.]

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN M. ROSS,	)	No. 80-5223
	)	
Plaintiff-Appellant,	)	Filed May 18, 1981
	)	
v.	)	
	)	
SAN DIEGO COUNTY SUPERIOR COURT, et. al.,	)	MEMORANDUM
	)	
	)	
Defendants-Appellees.	)	

Appeal from the United States District Court for the Southern District of California

Honorable Howard B. Turrentine, District Judge, Presiding

Argued and Submitted May 5, 1981

Before: BROWNING, Chief Judge, FERGUSON Circuit Judge, WILLIAMS*, District Judge

The district court correctly dismissed appellant's complaint against all the persons named in appellant's complaint in No. 79-3509 because the final order of dismissal in the earlier case barred relitigation against those defendants. The complaint against two additional Superior

Court judges failed to satisfy the jurisdictional prerequisites of 28 U.S.C.§1343 (3), as explained in our memorandum in No. 79-3509. The complaint against California Chief Justice Rose Bird was correctly dismissed for the reasons stated in the district court's opinion. The complaint against attorney Homme was correctly dismissed for want of jurisdiction and absence of any federal question.

The district court was fully justified in awarding appellees $4,675 in attorney fees and costs on the ground that appellant had engaged in a pattern of wanton, oppressive and vexatious litigation. Hall v. Cole, 412 U.S. 1, 5 (1973); see also Roadway Express, Inc. v. Piper, 447 U.S. 752, 764-67 (1980); United States v. of California, 603 F.2d 100 (9th Cir. 1979).

The motion for an award of attorney fees on appeal is denied.

AFFIRMED.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

JOHN M. ROSS, Plaintiff, v. THE HONORABLE ROSE BIRD, in her capacity as Chief Justice of the California Supreme Court, et. al., Defendants.	Civil No. 79-1725-T Filed Feb 21, 1980 O P I N I O N

This case is the latest in a line of protracted litigation which began in 1978. The plaintiff, John M. Ross, is an attorney licensed to practice law in the State of California, and admitted to practice before the District Court of the Southern District of California. He has appeared in pro per in what is now a total of seven lawsuits, all arising out of the same transaction and factual context. In the instant case, Mr. Ross has named [sic] Chief Justice of the California Supreme Court, the Honorable Rose Bird, as a defendant.

All answering defendants have moved to dismiss the complaint, and have petitioned the Court for an award of attorney fees.

This history of Ross' litigation, which is somewhat confused by the myriad of filed pleadings, is as follows. An action was originally filed in Micgigan, entitled Ross v. Fowler, et al., which arose out of a contract for the sale of certain real property in El Cajon, California. Mr. Ross was the buyer. He alleged breach of contract against the seller and sought damages and injunctive relief against no less than ten defendants. This case was transferred to the Southern District of California, and became case 78-161-T.

In case 78-161-T, the court denied Ross' motion for partial summary judgment, granted two defendants' motion to dismiss with prejudice (one of these defendants was defense counsel), and ordered Mr. Ross to file one integrated amended pleading in

accordance with Local Rule 4K. Plaintiff Ross filed an amended complaint which did not conform to Rule 4K, and appealed the order of the Court. About one month later Mr. Ross' motion to amend the complaint to add additional parties was denied, and he was again ordered to file in accordance with Rule 4K. This later order was followed promptly by another appeal.

In November, 1979, Mr. Ross filed a petition for injunction, in which he used obsenities in clear violation of pleading requirements. The Court warned Mr. Ross about future abuses in its order denying injunction, filed December 12, 1979.

Another action was filed by Mr. Ross in 1979, Ross v. San Diego County District Attorney, San Diego Superior Court No. 432616. This action sought to compel the state prosecuting authorities to institute criminal prosecution against the Fowler defendants. The case was promptly dismissed.

Still another state court action was instituted, No. 439708, entitled Ross v. Fowler, et al., which was a complaint for a judgment tracing embezzled and converted funds. The funds, of course, were directly tied to the contract for the El Cajon property sale, which was never consummated. A demurrer to the complaint was sustained.

The only state court suit which has come to fruition was instituted by Fowler and Mitchell, the developers of the real estate, against Mr. Ross, seeking rescission of the sales contract and declaratory relief. A claim for slander was also joined. That action, No. 409736 is now set for trial on March 25, 1980. [The trial date was continued five times through 1981 upon the motion of attorneys for Fowler et. al., and the Superior Court refused to grant a jury trial in the rescission action as mandated by Radinsky v. T.W. Thomas, Inc., 264 Cal. App. 2d 75, 79-80 (1968) and the 7th

Amendment of the U.S. Constitution.] All [interlocutory] appeals therein [challenging jurisdiction] have been dismissed.

Four federal lawsuits, including the instant action, have also been initiated by Mr. Ross. Case 78-161-T, discussed supra, apparently set the stage for ensuing federal litigation. Ross later filed a [diversity] complaint for damages [for defamation] against the Fowlers alone, No. 78-300-GT, and after filing of an amended complaint and motions to dismiss, the case was dismissed on the Court's motion under Local Rule 237 for want of prosecution [with the consent of the parties].

Subsequently, Ross filed another new complaint, No. 79-226-T, Ross v. Honorable San Diego Superior Court Judges, et. al., which sought damages and injunctive relief for deprivation of civil rights against State Court Judges Lord, Tharp, Overton and Orfield. The gravamen of the claim

against these defendants was a conspiracy charge in connection with alleged wrongdoing by the Fowler defendants. [Actually, the gravamen is that the Superior Court was violating due process by acting where there was a total lack of jurisdiction because of the first tribunal rule, and because of the failure to grant a hearing on the issue of jurisdiction.] The Fowler defendants were also named in the complaint, and all claims were ultimately based on the same land sale contract dispute. This Court dismissed the action with prejudice as to all defendants on July 17, 1979, and Ross appealed in August. In November, while the appeal was pending, he moved to file an amended complaint. The motion, at Ross' request, was never heard.

In an attempt to circumvent the court's lack of jurisdiction after the dismissal and appeal of 79-226-T, Mr. Ross filed the instant action. In addition to all of the

defendants named in 79-225-T, he has also named Superior Court Judges Butler and Rosado, attorney Richard Crake, and Chief Justice Rose Bird. The complaint, in all respects, is virtually identical to 79-226-T, and prays the same relief against the same defendants.

Clearly, the inclusion of the Chief Justice in this lawsuit is completely without merit. Ross merely alleges that she failed to read his petition for a hearing before the California Supreme Court. Little doubt exists, however, that the Supreme Court may, in its discretion, deny a hearing. Furthermore, the Chief Justice is immune from liability for her official acts. Pierson v. Ray, 386 U.S. 547 (1967). The [sic] constitution does not govern the amount of research done by a state court judge. Griffen v. Seismic Services, Inc., 353 F. Supp. 989, 990 (E.D. La. 1973).

Every case reaches a point where litigation must come to an end. When Mr. Ross sought a hearing before the Supreme Court, the issue of the propriety of an interlocutory appeal from the Superior Court [as to the issue of jurisdiction of the Superior Court] had been fully and finally decided [although the Court did not rule on the issue of jurisdiction and the black letter law that jurisdiction may be challenged at any stage of litigation]. Principles of res adjudicata prevent this court from reviewing the actions of the California courts. See Scott v. California 426 F.2d 300 (9th Cir. 1970).

Furthermore, the kind of relief sought [a declaratory judgment that state courts can not evade a challenge to their jurisdiction] is not within the jurisdictional realm of the federal district courts. Clark v. State of Washington, 366 F.2d 678 (9th Cir. 1966). Serious constitutional

barriers prevent this Court from compelling the highest state court to exercise its discretion to grant a hearing [Note: per Gonzalez v. Consejo Nacional de Producion de Costa Rica, 614 F.2d 1247, 1250 (9th Cir., Cal., 1980) the Constitutional issue was more properly stated that there is no discretion but to entertain a challenge to jurisdiction].

The obvious frivolity of the claim against Justice Bird also inheres in the claims against the other defendants. The Superior Court judges, as held in 79-226-T, are immune from suit in this matter. Stump v. Sparkman, 435 U.S. 349, 359 (1978); Mirin v. Justices of Supreme Court of Nevada, 415 F. Supp. 1178 (D. Nev. 1976). And as to those judges also named in the previous action, collateral estoppel clearly precludes further litigation of the issue of their liability.

Collateral estoppel also bars further

litigation of the claims of Ross against the Fowler defendants and attorney Richard Crake, who like the judges, were dismissed from prior actions with prejudice. No legal reason whatsoever supports the bringing of another action against these defendants at this time.

From the above discussion it becomes evident that Mr. Ross has engaged in a pattern of wanton, oppressive and vexatious litigation. Hall v. Cole, 412 U.S. 1, 5 (1973). He has harrassed the defendants on numerous occasions by filing frivilous and meritless complaints, petitions and motions. This Court has heretofore restrained itself from imposing sanctions upon plaintiff Ross. Such abuses must be curbed.

Accordingly, it is the opinion of the Court that the motions of all defendants to dismiss the complaint in the instant action shall be granted.

Furthermore, the Court shall make the following award:

(1) the sum of $1,500.00 attorney's fees plus the sum of $175.00 costs to Jerome B. Falk, Jr., counsel for Chief Justice Rose Bird;

(2) the sum of $1,500.00 attorney's fees to the Offices of County Counsel, County of San Diego;

(3) the sum of $1,500.00 attorney's fees to the Law Offices of Mc Lean and Mc Lean.

Dated: February 19, 1980.

/s/ Howard B. Turrentine
United States District Judge

COPY TO:

[Counsel of record.]

[ ] = Appellant's remarks.

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XV

DECLARATION OF SERVICE BY MAIL PER RULE 28.2

John M. Ross declares as follows: I am a member of the Bar of the United States Supreme Court, having been duly admitted on April 1, 1974; the foregoing Petition For Writ Of Certiorari was served on each of the following addressees by mailing three copies thereof to each addressee via the U.S. Postal Service, deposited at San Diego, California, with First class postage therefor fully prepaid, on the date of this declaration.

ADDRESSEES:

U.S. Court Of Appeals For The Ninth Circuit, P.O. Box 547, San Francisco, CA. 92104

Hon. Howard B. Turrentine, U.S. District Court, 940 Front Street, San Diego, CA. 92189

Jermone B. Falk, Jr., 650 California Street San Francisco, CA. 94108

Philip L. Kossy, Esq., 1600 Pacific Highway, Room 355, San Diego, CA. 92101

Donald F. Mc Lean, Jr., 600 B Street, Ste. 2350, San Diego, CA. 92101

This declaration is executed under the penalty of perjury at San Diego, California on October 20, 1981.

John M. Ross - Declarant

STATE OF CALIFORNIA)
) ss
County of San Diego)

On this 20th day of October, 1981, before me, a notary public in and for the County of San Diego, State of California, appeared John M. Ross, a person known to me, who, being first duly sworn, swore that he has read the foregoing declaration of service by mail and knows the contents of it to be true.

COPY

Mary Ann Ross-Notary Public
San Diego County, California
My Commission Expires 5-13-83

